Mohamad bin Senik v Public Prosecutor

HIGH COURT (SEREMBAN) — CRIMINAL APPEAL NO 42–107 OF 2002
LOW HOP BING J
17 JANUARY 2005

Criminal Procedure — Appeal — Sentence, against — Rape — 18 years' imprisonment and 10 strokes of rotan for rape of 14-year-old victim — Whether appellate interference warranted

Criminal Procedure — Sentence — Rape — 14-year-old victim — Whether 18 year imprisonment' and 10 strokes of rotan appropriate sentence — Whether commensurate with offence

The appellant was charged in the sessions court with the rape of a 14-year-old victim. The victim became pregnant and gave birth as a result of the rape. On the appellant's plea of guilt, he was convicted and sentenced to 18 years' imprisonment and to 10 strokes of the rotan. The sentence was ordered to run from the date of sentencing. He appealed to the High Court against sentence. On appeal, the record revealed that the appellant was serving a six year imprisonment sentence upon conviction on a second charge of rape upon the same victim, also resulting in the birth of a child. In pleading for a reduction in the 18 year sentence, the appellant pointed out that he had pleaded guilty to his crime; was remorseful and promised to reform; had five children, an aged and sickly mother; and was his family's sole bread-winner. The DPP however contended that the sentence was commensurate with the offence and ought therefore to be upheld.

Held, affirming the sentence and dismissing the appeal:

(1) In imposing sentence, the trial judge had considered all the relevant facts and circumstances. The judge had also considered the adverse effect of the appellant's conduct on the 14-year-old's future and the sentence the appellant was serving for the earlier charge of rape. The judge had correctly applied the established sentencing principles in relation to rape cases, and the guilty plea of the accused, as a mitigating factor (see para 11).

(2) The 18 year imprisonment sentence, which was ordered to run from the date of sentencing, was in line with s 282(d) of the Criminal Procedure Code ('CPC') and within the maximum prescribed under s 376 of the Penal Code. The sentence of 10 strokes of the rotan was also within the statutory maximum of 24 strokes prescribed under s 288(i) of the CPC. The trial judge had therefore not erred in law or in any manner whatsoever in the exercise of his discretion in imposing the sentence. On the facts, there was no reason for the High Court's appellate interference (see paras 12, 13 and 14).

[**Bahasa Malaysia summary**

Perayu telah dituduh di mahkamah sesyen dengan kesalahan merogol seorang mangsa berusia 14 tahun. Mangsa itu hamil dan melahirkan anak akibat dirogol. Atas pengakuan bersalah perayu, beliau disabitkan bersalah dan dihukum penjara selama 18 tahun dan 10 kali sebatan. Hukuman itu diarahkan bermula dari tarikh penghukuman. Perayu merayu kepada Mahkamah Tinggi terhadap hukuman itu. Semasa rayuan, rekod menunjukkan bahawa perayu sedang menjalankan satu hukuman selama enam tahun atas sabitan penuduhan yang kedua ke atas mangsa yang sama yang juga mengakibatkan seorang anak dilahirkan. Dalam rayuannya untuk mengurangkan penghukuman penjara selama 18 tahun, perayu merujuk kepada pengakuan bersalahnya, bahawa dia rasa kesal dan janji untuk bertaubat; mempunyai lima orang anak, seorang ibu yang tua dan sakit; dan merupakan 'sole bread winner' bagi keluarganya. DPP menghujah bahawa penghukuman itu wajar dengan kesalahannya dan sepatutnya disahkan.

Diputuskan, mengesahkan penghukuman itu dan menolak rayuan itu:

(1) Dalam menjatuhkan hukuman itu, hakim pembicaraan telah meneliti semua fakta dan situasi yang relevan. Hakim juga telah meneliti semua kesan buruk ke atas masa depan budak yang berusia 14 tahun itu akibat dirogol serta hukuman yang perayu sedang menjalankan untuk kesalahan sebelumnya. Hakim betul dalam menggunakan rukun-rukun penghukuman yang sedia ada bagi tujuan kes-kes rogol dan pengakuan bersalah perayu sebagai faktor peringanan (lihat perenggan 11).

(2) Hukuman penjara 18 tahun yang dijatuhkan untuk bermula pada tarikh penghukuman adalah mengikut s 282(d) Kanun Acara Jenayah dan menurut penghukuman maksimum yang diperuntukkan dalam s 376 Kanun. Hukuman 10 kali rotan juga tidak melebihi had maksimum 24 kali rotan yang diperuntukkan di bawah 288(i) Kanun. Hakim bicara oleh itu tidak salah di sisi undang-undang dalam menggunakan budibicaranya apabila menjatuhkan hukuman itu. Berdasarkan fakta, tidak terdapat alasan untuk Mahkamah Tinggi campuri tangan (lihat perenggan 12, 13 dan 14).]

Notes

For cases on appeals against sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 558–574.

For cases on rape sentences, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3790–3798.

Cases referred to

Chia Kim Heng Frederick v PP [1992] 1 SLR 361 (refd)
Hairani bin Sulong v PP [1993] 2 CLJ 79 (refd)
Ismail Rasid v PP [1999] 4 CLJ 402 (refd)

Jamaludin bin Langkiau v PP, Kota Kinabalu Criminal Appeal No K–42–03 of 2002 (refd)
Manuava Venkareswarlu v State [1995] 2 Crimes (AP) 854 (refd)
Mohamed Abdullah Ang Swee Rang v PP [1988] 1 MLJ 167 (refd)
Ong Lai Kim v PP [1991] 3 MLJ 111 (refd)
Ooi Sim Yim v PP [1990] 1 CLJ (Rep) 223 (refd)
PP v Abd Rahman bin Md Kassim, 5 Mallal's Digest (4th Ed, 2001 Reissue) (refd)
PP v Koh Jin Lie, 5 Mallal's Digest (4th Ed, 2001 Reissue) para 2938 (refd)
PP v Yap Koon Mong [1999] 4 SLR 257 (refd)
PP v Low Kok Wai [1988] 3 MLJ 123 (refd)
PP v Ooi Wang San [1998] 2 MLJ 765 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Yap Huat Heng [1985] 2 MLJ 414 (refd)
R v Billam [1986] 1 All ER 985 (refd)
R v Roberts [1982] 1 All ER 60 (refd)
Ramli Kechik v PP [1986] CLJ (Rep) 243 (refd)
Rex v Leo Ce Cruz [1935] MLJ 1 (refd)
Rex v Teo Cheng Lian [1949] MLJ 170 (refd)
Sidek bin Ludan v PP [1995] 3 MLJ 178 (refd)
Sou Soo Kim v PP [1975] 2 MLJ 134 (refd)

Legislation referred to

Penal Code 376, 375(f)
Criminal Procedure Code s 282(d)

Appeal from: Arrest Case No 62–51 of 2002 (Sessions Court, Kuala Pilah).

Mohamad Senik in person.
Roslan bin Hj Abu Bakar (Deputy Public Prosecutor) (Attorney General's Chambers) for the prosecution.

Low Hop Bing J:

I APPEAL

[1] This is an appeal by the appellant–accused ('the accused') against the decision of the learned sessions court judge of Kuala Pilah ('the trial judge') who had on 2 October 2002 imposed a sentence of 18 years imprisonment with effect from the date on which the sentence was imposed ie 2 October 2002; and 10 strokes of the rotan (cumulatively 'the sentence'), after the accused had pleaded guilty to the following charge:

> Bahawa kamu pada bulan Februari 1997 hingga bulan April 1997 di rumah No 1000 Tampin Jaya, Tampin, di Daerah Tampin di dalam Negeri Sembilan telah merogol ABD, NRIC No XYZ dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah s 376 Kanun Kesiksaan.

My translation:

> That you in the month of February 1997 until the month of April 1997 at house No 1000 Tampin Jaya, Tampin, in the district of Tampin, in Negeri Sembilan did rape ABC, NRIC No XYZ and that you have thereby committed an offence punishable under s 376 of the Penal Code.

[2] I have deleted the name and the identity card number of the complainant in order to protect her anonymity.

[3] The complainant was 14 years of age at the time of the offence, and the conviction recorded against the accused was therefore for statutory rape wherein the consent of the complainant is irrelevant: s 375(f) of the Penal Code.

II FACTS OF THE CASE

[4] The accused and the complainant had been neighbours since 1996 and are known to each other.

[5] On 13 September 1997, when the complainant's sister returned to Tampin for holidays, the sister observed that the complainant's stomach had swollen, as a result of which the sister brought the complainant to Klinik Asia Melaka so as to confirm whether the complainant was in fact pregnant. On the same day, the complainant lodged a police report vide Tampin Report 1253/97.

[6] On 3 October 1997, the complainant gave birth to a baby boy ('the baby') in Seremban Hospital. The police had taken blood samples from the complainant, the accused and the baby for Deoxyribonudeic Acid (DNA) analysis by the Chemistry Department in Petaling Jaya, whose chemist confirmed the accused as the biological father of the baby and that the probability of paternity is 99.6%.

[7] The accused was arrested on 14 September 1997 and was released on police bail, during which the accused had sexual intercourse again with the same complainant resulting in the delivery of a second baby by the complainant. For that episode, the accused was charged with another offence of statutory rape under s 376, to which he had also pleaded guilty and was convicted thereon in Seremban sessions court arrest case No 62–79–99. He was sentenced to six years imprisonment with effect from 20 September 1999. Before me there was no appeal against that sentence.

III GROUNDS OF APPEAL

[8] In asking for a more lenient sentence, the accused's petition of appeal stated that he has pleaded guilty, was remorseful and promised to reform himself, and to become a useful citizen, as he has five children, two of whom are still school-going, while his aged mother is sickly, and he is the sole supporter of his family.

[9] En Roslan bin Hj Abu Bakar, the learned deputy public prosecutor, responded that the sentence is commensurate with the offence and so should be upheld.

[10] In my judgment, it is useful to revisit the general sentencing pirinciples that had been mapped out by the courts in relation to rape cases.

(1) In *R v Roberts* [1982] 1 All ER 60, the English Court of Appeal enunciated:

> Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. ... A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

(2) In respect of adult rape offenders, Lord Lane CJ in *R v Billam* [1986] 1 All ER 985 at p 987 expressed the following sentiment:

> For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as a starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.
>
> At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.
>
> Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

(3) In *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361, at p 367, the Singapore Court of Appeal held, *inter alia*, as follows:

> In our opinion, for a rape committed without any aggravating or mitigating factors, a figure of 10 years imprisonment should be taken as the starting point in a contested case, in addition to caning. The court should then consider in turn the mitigating factors which merit a reduction of the sentence, of which a guilty plea which saves the victim from further embarrassment and suffering will be an important consideration and will merit a reduction of one-quarter to one-third of the sentence; and whether there were other factors such as the victim's youth or the accused person's position of responsibility and trust towards her, or perversions or gross indignities have been forced on the victim, which justify a longer sentence.

(4) In Malaysia, although Abdul Malik Ishak J said in *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178, 188 that there are no strict guidelines as to

the type of sentences to impose in rape cases, it is trite law that the court in imposing sentence must take into consideration public interest which demands that a deterrent sentence be given: see also *Public Prosecutor v Yap Huat Heng* [1985] 2 MLJ 414, 416 per Shaik Daud J (as he then was); *Ong Lai Kim v Public Prosecutor* [1991] 3 MLJ 111, 115 per Zakaria Yatim J (later FCJ); *R v Roberts*; *PP v Abd Rahman bin Md Kassim*, 5 Mallal's Digest (4th Ed, 2001 Reissue) para 3469 per Mohd Hishamudin J.

(5) In a given case, there may be aggravating factors such as those enumerated by Richard Malanjum JC (now JCA) in *Hairani bin Sulong v PP* [1993] 2 CLJ 79 at 85 as follows:

> The crime should in any event be treated as aggravated by any of the following factors:
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> (1) violence is used over and above the force necessary to commit the rape;
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> (2) a weapon is used to frighten or wound the victim;
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> (3) the rape is repeated;
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> (4) the rape has been carefully planned;
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> (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual indignities or perversions;
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> (6) the victim is either very old or very young;
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> (7) the effect on the victim, whether physical or mental, is of special seriousness.
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> Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

(6) The physical and mental suffering which the victim endures as a result of rape, should form a vital ingredient. The offence of rape leaves the victim with feelings of humiliation, degradation and guilt. Rape is an experience which shakes the foundations of the lives of the victims. The offence of rape must be dealt with as the gravest crime against the human dignity: *Manuava Venkareswarlu v State* [1995] 2 Crimes (AP) 854 of the Andhra Pradesh High Court of India; see also *Hairani*, per Richard Malanjum JC (now JCA) at p 85.

(7) The principle of retribution should not be overlooked, as has been expressed by Lord Lawton in *R v Sarjeant* [1974] in the following words :

> There is, however, another aspect of retribution which is overlooked; it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which they, the courts, can do this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

(see also *Yap Huat Heng*, *Ong Lai Kim*, *Abdul Rahman bin Md Kassim*, *Ismail Rasid v PP* [1999] 4 CLJ 402 per KN Segara J)

(8) In *PP v Yap Koon Mong* [1999] 4 SLR 257:

> Yong Pung How CJ in delivering the judgment of the Singapore Court of Appeal held at p 263 that while a longer sentence might result in the family suffering from severe financial hardship, it was not a relevant consideration. (See also *R Ingham* (English Court of Appeal (Cr D), 3 October 1974, unreported, followed in *Lai Ooi Mui Jenny v PP* [1993] 3 SLR 305.)

(9) The accused's plea of guilt is a relevant consideration: *Jamaludin bin Langkiau v PP*, Kota Kinabalu Criminal Appeal No K–42–03 of 2002 per Ian HC Chin J; *PP v Koh Jin Lie*, 5 Mallal's Digest (4th Ed, 2001 Reissue) para 2938, Singapore High Court; *Yap Koon Mong*, Singapore Court of Appeal; *Chia Kim Heng Frederick*, Singapore Court of Appeal.

V IS THE SENTENCE APPROPRIATE?

[11] In imposing the sentence, the trial judge had taken into consideration all the facts and circumstances as adumbrated above, in particular the adverse effect of the accused's conduct on the future of the 14-year-old complainant and the sentence the accused was serving at the time the sentence was imposed. The trial judge has also correctly applied the established sentencing principles in relation to rape cases, and the guilty plea of the accused, as a mitigating factor in line with *Sou Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 FC; *Mohamed Abdullah Ang Swee Rang v PP* [1988] 1 MLJ 167 SC; *Public Prosecutor v Koh Jin Lie*, 5 Mallal's Digest (4th Ed, 2001 Reissue) para 2938; *Public Prosecutor v Low Kok Wai* [1988] 3 MLJ 123; and *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45 HC, all of which were cited in the trial judge's grounds of decision.

[12] Further s 282(d) of the Criminal Procedure Code ('s 282(d)') provides that every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing sentence otherwise directs. Section 282(d) gives the sentencing court a discretion whether to order the commencement of the sentence on such convicted person, either immediately ie on the date the sentence was passed or to direct otherwise. See also *Public Prosecutor v Ooi Wang San* [1998] 2 MLJ 765 CA; and *Ooi Sim Yim v Public Prosecutor* [1990] 1 CLJ (Rep) 223.

[13] The trial judge has ordered the sentence to take effect from 2 October 2002 which involves an overlapping of about one year in the six-year-imprisonment which the accused was serving at the time the sentence was imposed. This sentence appears to me to be in line with s 282(d) and the statutory maximum of 20 years imprisonment prescribed under s 376 of the Penal Code, while the sentence of 10 strokes of the rotan is within the statutory maximum of 24 strokes prescribed under s 288(i) of the Criminal Procedure Code.

[14] Having anxiously considered the trial judge's well-researched grounds of decision, I am of the view that the trial judge has not erred in law or in any manner whatsoever in the exercise of his discretion in imposing the appropriate sentence.

A VIFUNCTIONS OF APPELLATE COURT

[15] It is trite law that an appellate court will not interfere with the decision of the court below on the question of sentence unless eg:

(1) the trial judge has proceeded on wrong principles: *Rex v Leo Ce Cruz* [1935] MLJ 1 CA per Huggard CJ;

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(2) there is manifest error, either in law or in considering the facts and circumstances or an omission to consider such facts and circumstances: *Rex v Teo Cheng Lian* [1949] MLJ 170 per Gordon-Smith J; or

C

(3) an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice: per Mohamed Azmi SCJ (as he then was) in *Ramli Kechik v PP* [1986] CLJ (Rep) 243 SC.

D VII CONCLUSION

[16] As the sentence imposed by the trial judge is appropriate, it is hereby affirmed and so this appeal is hereby dismissed.

Appeal dismissed.

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Reported by John Paul Simon

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